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FEB 18 2010

**SECRETARY, BOARD OF
OIL, GAS & MINING**

**BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

UTAH CHAPTER OF THE SIERRA CLUB,
SOUTHERN UTAH WILDERNESS
ALLIANCE, NATURAL RESOURCES
DEFENSE COUNCIL, and NATIONAL
PARKS CONSERVATION ASSOCIATION,

Petitioners,

DIVISION OF OIL, GAS AND MINING,

Respondent,

ALTON COAL DEVELOPMENT, LLC and
KANE COUNTY, UTAH

Intervenors,

ORDER CONCERNING
MOTIONS TO DISMISS

Docket No. 2009-019
Cause No. C/025/0005

The parties filed the following briefs concerning motions to dismiss certain of
Petitioners' claims in this Cause pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure:

- Division's Motion to Dismiss Certain Claims;
- Division's Memorandum in Support of Motion to Dismiss Certain Claims ("Division's Brief");
- Respondent Alton Coal Development, LLC's Motion and Memorandum in Support of Partial Summary Judgment ("ACD's Brief");
- Intervenor's Memorandum in Support of Respondent's Motion for Partial Summary Judgment;
- Kane County's Joinder in Alton Coal LLC's Motions and Memoranda for Summary Judgment;

- Petitioners' Memorandum in Opposition to Division's Motion to Dismiss Certain Claims and Alton Coal Development's Second Motion for Partial Summary Judgment ("Opposition Brief").

The Board heard oral argument on the Division's Motion to Dismiss on January 27, 2010. At that hearing, Permittee Alton Coal Development, LLC requested that the Board consider its Motion for Partial Summary Judgment as a motion to dismiss under Rule 12(b)(6) insofar as its partial summary judgment motion relates to the same claims that are the subject of the Division's Motion to Dismiss.

NOW THEREFORE, the Board, having considered the above-listed briefs, the oral argument given on January 27, 2010, and good cause appearing, hereby denies the motions to dismiss. This result was reached by a split vote of four to three as to the claim pertaining to cultural and historic resource information, and by unanimous vote as to the remaining claims. A discussion of the Board's ruling with respect to the three claims subject to the motions to dismiss follows.

I. CLAIM PERTAINING TO SAGE GROUSE PROTECTION.

Petitioners allege that the permit application package failed to include a wildlife protection plan with adequate protections for sage grouse in violation of Utah Admin. Code R645-301-330. Petitioners note that the Utah Division of Wildlife Resources ("DWR") raised concerns regarding the general sufficiency of the plan's mitigation measures for sage grouse as well as the plan's lack of measures directed at monitoring and limiting road kill by haul truck traffic. Petition at 34-35. Petitioners allege that these concerns were never fully resolved, that no follow-up consultation with DWR occurred after the plan was revised, and that DWR never approved the final plan. Petition at 35.

Respondents, in moving to dismiss this claim, argue that DWR approval of the wildlife protection plan is not a requirement of the regulations. Division's Brief at 9; ACD's Brief at 10. They also argue that once input from DWR is received, follow-up consultations are not required. ACD's Brief at 10. The Board agrees with Respondents that the regulations which require DOGM to consult with DWR in determining the scope and level of detail of wildlife information do not require follow-up consultations or the ultimate approval of DWR.

The petition, however, broadly read as it must be under Rule 12(b)(6),¹ alleges not only that DWR did not approve the plan, but more generally that the plan is inadequate. The petition cites the sage grouse protection issues raised by DWR as examples of alleged deficiencies, and offers DWR's expressed concerns as evidence of those deficiencies. Because the allegations on this issue at least minimally state a claim, and the particular requirements for dismissal under Rule 12(b)(6) are not met, the Board will not dispose of this claim at this time. Petitioner may present evidence on this claim at the evidentiary hearing and will bear the burden of showing that regulations pertaining to wildlife protection were violated.

II. CLAIM PERTAINING TO AIR POLLUTION CONTROL PLAN.

Petitioners allege two deficiencies in the permit application's fugitive dust control plan. First, Petitioners argue that the plan fails to address the impact of the proposed mining operations on the night sky as seen from Bryce Canyon National Park. Petition at 26-27. In moving to dismiss, Respondents argue that the regulations require dust control practices to comply with state and federal air quality standards, but create no duty on the part of the Division to consider impacts to the night sky. Division's Brief at 8; ACD's Brief at 22. The Board agrees that the

¹ See *Ho v. Jim's Enterprises, Inc.*, 2001 UT 63, ¶6, 29 P.3d 633 (noting court must "accept the factual allegations of the complaint as true and consider all reasonable inferences to be drawn

controlling regulations create no requirement to consider the impact of fugitive dust on night sky clarity.

Second, Petitioners cite Utah Admin. Code R645-301-420, which requires that the permit application include an air quality monitoring program which provides sufficient data to evaluate the effectiveness of the fugitive dust control practices. Petition at 26. Petitioners allege that while the proposed monitoring program relies on EPA Method 9, the Division conceded that it did not possess the expertise necessary to evaluate the use of that method for monitoring purposes. *Id.* Petitioners therefore allege that the Division made no determination that adequate monitoring measures were included in the plan as required by the applicable regulations.

The Division counters that the controlling regulations contemplate interagency coordination between the Division and the Division of Air Quality (“DAQ”), and further alleges that DAQ found EPA Method 9 to be acceptable. Division’s Brief at 8. While evidence of DAQ’s finding regarding EPA Method 9 may go far in refuting the allegation of inadequate air quality monitoring provisions, it implicates matters outside the pleadings, and the issue therefore cannot be resolved on a motion to dismiss. *See Sony Electronics Inc. v. Reber*, 2004 UT App 420, ¶¶ 11-13, 103 P.3d 186 (holding trial court erred in relying upon matters outside of the pleadings in ruling on 12(b)(6) motion). Because the particular requirements for dismissal under Rule 12(b)(6) are not met, the Board will not dispose of this claim at this time. Petitioner may present evidence on this claim at the evidentiary hearing and will bear the burden of showing that regulations pertaining to air pollution control were violated.

from those facts in a light most favorable to the plaintiff”).

III. CLAIM PERTAINING TO CULTURAL/HISTORIC RESOURCE INFORMATION.

Petitioners' arguments concerning the alleged failure of the Division to consider impacts to cultural and historic resources within the Panguitch National Historic District ("PNHD") are problematic and somewhat unclear.

A. **Allegations Concerning the CRMP.**

The petition contains a discussion of the Cultural Resource Management Plan ("CRMP") submitted by ACD, concerns raised by commenting parties during the CRMP's development, and alleged failures to remedy certain deficiencies in the plan. Petition at 24-25. Petitioners do not explain in the petition whether the CRMP was developed solely to comply with obligations to consider cultural and historic resources under applicable state law, or was also developed to satisfy additional federal requirements not at issue here (such as compliance with the National Environmental Policy Act ("NEPA") in connection with the leasing of federal coal). While Petitioners later acknowledge in their opposition memorandum that the CRMP was developed in part to satisfy requirements of federal law, see Opposition Memorandum at 6, they do not ultimately clarify whether the criticisms of the CRMP discussed in the petition pertained to the Division's duties under state law or to unrelated federal mandates. This creates difficulty for the Board in understanding the claim Petitioners are attempting to state.

Petitioners charge that the CRMP itself acknowledges that the foreseeable transportation route for coal through the PNHD should be included within the "affected area" of the project. Petition at 25. The Division argues in its brief, however, that the CRMP² does not employ the term "affected area," but references instead the "affected environment," an area defined under

separate and inapplicable federal standards. Division's Brief at 4, n.1. *See also* ACD's Brief at 14-15. Even taking Petitioner's allegation that the CRMP discusses the PNHD's inclusion within the "affected area" as true, however, the Board notes the petition fails to explain the significance of this reference. The term "affected area," while a defined term under the coal rules, is not found in any of the operative provisions governing the Division's duty to analyze potential impacts to cultural and historic resources. As noted below, the controlling provisions obligate the Division to consider such impacts within the "permit area" and "adjacent areas." The term "affected area" is used in portions of the regulations pertaining to reclamation plan requirements and other matters not related to the Division's analysis of cultural and historic resources.

Petitioners also allege that the Division itself criticized the CRMP's exclusion of the PNHD from its cultural resource analysis, allegedly evidencing the Division's own determination that the PNHD should have been included. Petition at 24-25. At oral argument, the Division clarified that the portion of the Technical Analysis ("TA") document referred to by Petitioner on this issue pertains not to state regulatory requirements but instead to inapplicable federal mandates. While this point concerning the contents of the TA may refute Petitioners' allegations, it implicates matters outside of the pleadings and therefore may not be resolved on a motion to dismiss.

B. Public Road Exclusion Issues.

Petitioners correctly identify the source of the Division's duty to analyze potential impacts to cultural and historic resources in citing R645-301-411.140, which requires that the

² To the extent these arguments refer to what a review of the CRMP will demonstrate, they refer to matters outside the pleadings, making resolution of these issues under 12(b)(6) inappropriate.

Division consider impacts to “cultural and historic resources listed or eligible for listing in the National Register of Historic Places and known archeological sites within the permit and adjacent areas.” Petition at 24. The scope of the Division’s duties under this provision turns upon an analysis of the meaning of the phrase “within the permit and adjacent areas.” The “permit area” is a defined term that encompasses the area upon which the operator will conduct “coal mining and reclamation operations” as that term is defined in the rules. *See* Utah Admin. Code R645-100-200. “Adjacent area” is the acreage outside the permit area where those same “coal mining and reclamation operations” can be reasonably anticipated to have an adverse impact. *Id.*

The Board disagrees with Petitioners’ argument that the question of which lands must be permitted is “irrelevant” to the analysis of which lands should be included within the “adjacent area.” As noted above, the area that must be permitted is determined by an analysis of where “coal mining and reclamation operations” are occurring. While the “adjacent area” is broader than the permit area, the definition of “adjacent area” likewise hinges on an analysis of activities that constitute “coal mining and reclamation operations.” The “adjacent area,” rather than being restricted to areas upon which “coal mining and reclamation operations” are occurring, encompasses those lands which might reasonably be anticipated to be adversely affected by those same operations. Activities that do not constitute “coal mining and reclamation operations” are not relevant to the “adjacent area” analysis. Even if there are lands potentially affected by such activities, those lands do not thereby qualify as “adjacent areas.”

Under the “adjacent area” definition discussed above, the Board struggles to see how a public highway³ through a town some 20-30 miles from the permit area can be argued to fall within the “adjacent area”. Because the definition of “adjacent area” directly depends upon an analysis of the scope of “coal mining and reclamation operations,” the case law cited by ACD construing the meaning of the parallel federal definition of “surface coal mining operations” is instructive. ACD cites *Harman Mining Corp. v. Office of Surface Min. Reclamation and Enforcement*, 659 F.Supp. 806 (W.D. Va. 1987), in which the court analyzed whether the use of roads for access or haulage should be included within the definition of “surface coal mining operations.” The *Harman* court held that such use, where it occurred on public roads, fell outside of this definition, and that the roads therefore need not be permitted.⁴ *Id.* at 811.

Petitioners respond to ACD’s *Harman* argument by clarifying that they claim not that US Highway 89 should be permitted, but only that the PNHD should fall within the “adjacent area.” As discussed above, however, those two questions are closely related. Petitioners’ argument appears to be that the historic buildings and other resources within the PNHD would be affected by vibration, noise, etc. from coal transportation truck traffic through Panguitch. Petition at 9-10, 13 and 25. Only if such traffic constitutes a “coal mining and reclamation operation,” however, does its potential effects within the PNHD make the PNHD part of the “adjacent area.”

³ There is some discussion in the briefs about the specific road exemption set forth in the definition of “affected area” under the coal rules. As Petitioners note, the specific exemption for public roads has been suspended. See Editorial Note to “Affected Area” definition found at Utah Admin Code R645-100-200. The now-suspended exemption for public roads is not the only law cited by respondents in support of their argument concerning US Highway 89 and the PNHD, however. See discussion of *Harman*, below.

⁴ *Harman* was decided after the decision in *In re Permanent Surface Min. Regulation Litig.*, 620 F.Supp. 1519 (D.D.C. 1985), and the resulting suspension of the specific road exemption formerly contained in the federal regulations. The *Harman* court discussed the suspended

Harman strongly suggests coal transportation on US Highway 89 would not be considered a “coal mining and reclamation operation,” would not require that road to be permitted, and would therefore not require inclusion of the PNHD within the “adjacent area” even if the effects of that traffic might potentially be felt there.

Petitioners argue that even if *Harman* (and the 1995 Division policy letter cited by ACD which also addresses the permitting of public roads) are relevant to the “adjacent area” inquiry, those authorities make clear that whether a road needs to be permitted involves factual inquiries that cannot be resolved on a motion to dismiss. Opposition Brief at 11-12. The *Harman* analysis and factors discussed in the Division’s 1995 policy letter primarily involve whether the road at issue is a public road. It appears unlikely to the Board that there will be any genuine dispute about the public nature of US Highway 89 as it traverses the PNHD.

Nevertheless, when Petitioners’ allegations are taken together and read broadly in a light most favorable to Petitioners as required under Rule 12(b)(6), the allegations of the petition charge that the PNHD falls within the “adjacent area” as defined in R645-100-200, that the Division failed to consider the impacts of “coal mining and reclamation activities” as defined in that same rule on the PNHD, and that R645-301-411.140 was thereby violated. These allegations and the theory they advance are strongly disputed by the Division and ACD and are greatly undermined by the reasoning of *Harman*. The Board at this juncture views Petitioners’ claim relative to the PNHD as deeply flawed and struggles to see what evidence Petitioner might offer to demonstrate that the PNHD, some 20-30 miles removed from the permit area, should be considered an “adjacent area” under the coal regulations. Nevertheless, given the liberality of

provision and ultimately based its holding not on the suspended regulation but on an analysis of SMCRA’s definition of “surface coal mining operations.”

Rule 12(b)(6), and given the references in the argument on this claim to the CRMP and other matters outside of the pleadings, the Board will not dispose of this claim at this time under Rule 12(b)(6).

For the reasons discussed above, the Division's and ACD's motions to dismiss are denied.

The Chairman's signature on a facsimile copy of this Order shall be deemed the equivalent of a signed original for all purposes.

Issued this 18 day of February, 2010

UTAH BOARD OF OIL, GAS & MINING

A handwritten signature in cursive script, appearing to read "Douglas E. Johnson", is written over a horizontal line. To the right of the signature is a vertical line.

Douglas E. Johnson, Chairman

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing ORDER CONCERNING MOTIONS TO DISMISS for Docket No. 2009-019, Cause No. C0250005 to be mailed with postage prepaid, this 22nd day of February, 2010, to the following:

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A handwritten signature in blue ink, reading "Julie Ann Carter", is written over a horizontal line.